

DEPARTMENT OF ADMINISTRATION
DIRECTOR'S OFFICE



BRIAN SCHWEITZER, GOVERNOR

JANET R. KELLY, DIRECTOR

STATE OF MONTANA

(406) 444-2032
FAX (406) 444-6194

MITCHELL BUILDING
125 N. ROBERTS, RM 155
PO BOX 200101
HELENA, MONTANA 59620-0101

August 23, 2006

Office of Public Defender
Harry Freebourn
44 W. Park
Butte, MT 59701

EXHIBIT 5

Re: Rule Making

Dear Mr. Freebourn:

The Commission is required to set standards for those it utilizes to defend the indigent. Some of those used will be employees, some contractors. You have asked whether the standards must be adopted pursuant to the Montana Administrative Procedure Act (MAPA).

MAPA requires that all "rules" be adopted in a specific manner. The term "rule" is defined at 2-4-102(11), MCA to include a broad variety of standards but exempted from that are "statements concerning only the internal management of an agency or state government and not affecting private rights." The "standards" for employees and contractors are usually set out in their position descriptions, RFP/IFB specs or contracts. I'd argue that position description and contract service specifications concern internal management of the agency. We have not thought they affect private rights. Consequently we don't think they need to be adopted as MAPA rules.

One might consider adopting these standards as MAPA rules just to be safe. However, one cannot adopt MAPA rules which are not "reasonably necessary" or that unnecessarily repeat statutory language, see 2-4-305, MCA. Some of the standards are found in law so if you decide to adopt standards don't unnecessarily repeat that law.

Please note that if non-MAPA rules and standards are adopted, that adoption may still be an "agency action of significant public interest" which means that an agency must allow for public participation, see 2-3-102 & 103, MCA. Even the award of a contract can be such an action. We notice up many kinds of non-MAPA matters and intra department rules on our website and invite the public to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Dal Smilie", written over a horizontal line.

Dal Smilie
Chief Legal Counsel

C: Gretchen Bingman